No. 11868

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THELMA TIPTON, MARY FOSTER, EVA C. WHITNEY, MARY F. DE BENEDETTI, CLARA OWENS TURNER, TRINIDAD MORA, DOROTHY MORA, DORA GRAJEDA, CONCHITA GRAJEDA, MARY TIBBITTS and GUSSIE BOURNE,

Appellants,

vs.

BEARL SPROTT COMPANY, INC., a corporation, BEARL SPROTT, individually and d/b/a BEARL SPROTT, DOE I, DOE II, DOE III,

Appellees.

Reply to Brief of the Administrator of Wages and Hours Division, United States Department of Labor, Amicus Curiae.

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A leave of Court first having been had and obtained appellee Bearl Sprott Company, Inc., a corporation, herewith presents its reply to the brief *amicus curiae* of the Administrator of Wages and Hours Division, United States Department of Labor.

ARGUMENT.

I.

Appellee's Business Was a Separate and Independent Entity Which Functioned Not as a Necessary Facility in the Production of Steel Products, but to Supply the Personal Wants of Those on the Steel Company's Premises Which Wants Existed Separate and Apart From Their Productive Effort and Would Have Existed Whether Steel Was Produced or Not.

Consolidated Timber Co. v. Womack (1942), 132 F. (2d) 101, is distinguishable from the instant situation before this Court by the following excerpts from the opinion:

> "* * * we find ourselves well within the limitations—the lines drawn—in a case lately announced by the Supreme Court involving substantially the same basic question, Kirschbaum v. Walling, and Arsenal Bldg. Corp. v. Walling, 316 U. S. 517 * * *.
>
> * * * * * * * *
>
> "* * * Here the cookhouse was a 'necessary' part of the Company's production of goods for commerce. It was not operating with the intent or purpose of showing a profit to the owners from the sale of food or service, but to render a very necessary assistance to the business of the Company, which was the production of logs in interstate commerce. The cookhouse was not a separate or independent establishment; it was actually a *part* of the Company's facilities—a link in the chain—whereby it operated its business and a means whereby it accomplished the purpose of its existence. * * *

> "* * * each (cookhouse) is a unit in the facilities necessary to the Company's production of goods for commerce. * * *"

Herein the appellee's business, as disclosed by the complaint, was a separate and independent business which functioned not as a necessary facilitity to the production of goods by Columbia Steel Co., but to supply the purely personal wants of those on the steel company's premises, which wants existed separate and apart from their productive efforts. In the *Womack* case the logging company therein involved operated the cookhouses as a facility needed in its production of logs. In the instant case the complaint contains no allegation which brings this case within the principles of the *Womack* case.

Two cases decided by the United States Supreme Court since the *Womack* decision clearly limit the extension of the principles of *Kirschbaum v. Walling* and *Arsenal Bldg. Corp. v. Walling* (1942), 316 U. S. 517 and emphasize the importance of the above distinction between the instant case and *Consolidated Timber Co. v. Womack.*

In *10 E. 40th St. Building, Inc. v. Callus* (1945), 325 U. S. 578, the court refused to extend *Kirschbaum v. Walling* and *Arsenal Bldg. Corp. v. Walling* to building maintenance employees employed by a company owning an office building as an indepedent local enterprise, although 47% of the tenants of the building were employees of producers for commerce. *10 E. 40th St. Building, Inc. v. Callus* definitely limits the principles of *Kirschbaum v. Walling* and *Arsenal Bldg. Corp. v. Walling* to occupations actually necessary to the physical processes of producing goods for commerce.

The *Womack* case must also be considered in conjunction with the subsequent case of *Roland Electric Co. v. Walling* (1945), 326 U. S. 657, wherein the court unmistakably limited the application of the word "necessary" as employed in Section 3(j) of the Act to occupations which are needed in the production of goods for commerce. Referring to what occupations are brought under the Act by Section 3(j), the court said, p. 664:

> "It is enough that his occupation be *'necessary to the production.'* There may be alternative occupations that could be substituted for it but it is enough that the one at issue is *needed* in such production and would, if omitted, handicap the production."

Appellee respectfully submits that the complaint in the instant case contains no allegation showing that such occupations as dishwashing, cooking, serving lunches and refreshments are needed in Columbia Steel Company's production of its products.

Appellee persists in its view that *McLeod v. Threlkeld* (1943), 319 U. S. 491, is of material help in determining upon the legal insufficiency of the complaint in the instant case. This, for the reason that the opinion in the *McLeod* case contains facts expressly recognized by the United States Supreme Court, which, upon the record in the instant case, are just as true and in point herein as they were in the case in which they were stated. The following is an excerpt from the opinion in the *McLeod* case, page 497:

> "* * * It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. *Food is consumed apart from their work. The furnishing of*

board seems to us as remote from commerce, in this instance, as in the cases where employees supply themselves. In one instance the food would be as necessary for the continuance of their labor as in the other." (Emphasis added.)

Support for defendant's last above stated contention is furnished by the following excerpt from the dissenting opinion by Chief Justice Stone (joined in by Mr. Justice Roberts) in *Borden Co. v. Borella* (1945), 325 U. S. 679, 686, which is a building maintenance employees case under the "production of goods for commerce" clause of the Act:

"The fact that it is convenient or even necessary for the president of the company to ride in an elevator does not seem to me to meet the requirement of the statute that the occupation must be one necessary to the physical process of production. The statute includes those who are necessary to that process, but it does not also include those who are necessary to them. The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process, as did the services rendered in Kirschbaum Co. v. Walling, *supra.*

"The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office. Compare McLeod v. Threlkeld, 319 U. S. 491. All are too remote from the physical process of production to be said to be, in any practical sense, a part of or necessary to it."

II.

The Trial Court Correctly Granted Appellee's Motion to Dismiss for the Reason That the Court Took Judicial Notice That the City of Torrance Is in a Heavily Populated Area With Many Restaurants, Cafes, and Lunch Rooms, and, Therefore, Appellants Would Be Unable to Show Inaccessibility and Necessity. Such Decision Is, Therefore, on the Merits.

Appellee's motion to dismiss was properly granted under the particular circumstances of this case. Appellants' complaint set forth in considerable detail their functions as employees of appellee, pointed out that the operations carried on by them were on the property of the Columbia Steel Company and that the Steel Company was unquestionably engaged in the production of goods for interstate commerce. It could be presumed that appellants in their third amended complaint, stated their case as strongly as possible, that if their case could have been put more strongly counsel would have done so. No showing of inaccessibility was made in the complaint and for all that is apparent from the record, the area close to the plant of the Columbia Steel Corporation could have been swarming with restaurants, cafeterias and lunchrooms. With the pleadings in this state it was possible to dismiss the complaint by reason of its failure to state a claim upon which relief could be granted, and in addition to predict that no complaint could be drawn based on the facts as they actually existed. This the court below could do, and did. This Honorable Court can also take judicial notice, as the Court below did, of the fact that the City of Torrance is in the midst of a metropolitan area of 3,500,000 people; that it is a large and substantial city

with many adequate restaurant, cafeteria and lunch room facilities. In addition, it is also a matter of common knowledge that box lunch sellers, traveling hamburger and sandwich stands and the housewife, packing a lunch box, provide meals preferred by many. The city of Torrance, as everyone knows, has been an established industrial, commercial and residential center for many years, and has been provided with all of the eating facilities economically justifiable. Laudable attempts of a manufacturing concern to provide attractive low cost meals on plant grounds or adjacent thereto, show a concern for the convenience of its labor force but fall far short of demonstrating that without in-plant feeding steel production would stop or be seriously curtailed or affected. In-plant feeding, where there is sharp outside competition, becomes merely one of a group of possible choices; where the individual workman will eat is dictated by considerations of quality, price, variety of menu, congeniality of surroundings, and is often-times controlled by the feeling of many men that they prefer to leave company property and seek a change of scenery and environment.

This Court, as well as the Court below, is entitled, under the law, to take judicial notice of such commonly accepted facts. Rule 43(a) of the Federal Rules of Civil Procedure provides that whichever of State or Federal Rules favors reception of evidence shall be followed. The leading case in California on the subject, cited and quoted at great length in IX Wigmore on Evidence, Third Edition, pp. 572-577, is *Varcoe v. Lee* (1919), 180 Cal. 338, 181 Pac. 223. This case involved the question whether a portion of Mission Street in the City of San Francisco, California, is a "business district." No evidence was before court or jury on this question, but the court never-

theless charged the jury that the place in question was a business district and that the speed limit on Mission Street was fifteen miles per hour. The Court said, page 344,

> "It should perhaps be noted that the fact that the trial judge knew what the actual fact was and that it was indisputable would not of itself justify him in recognizing it. Nor would the fact that the character of the street was a matter of common knowledge and notoriety justify him in taking the question from the jury if there were any possibility of dispute as to whether or not that character was such as to constitute it a business district within the definition of the statute applicable. If such question could exist, the fact involved—whether the well-known character of the street was sufficient to make it a business district—was one for determination by the jury. But we have in this case a combination of the two circumstances. In the first place, the fact is indisputable and beyond question. In the second place, It is a matter of common knowledge throughout the jurisdiction in and for which the court is sitting.
>
> "A consideration of the reasons underlying the matter of judicial notice and its fundamental principles leaves, we believe, but little doubt as to its applicability here. Judicial notice is a judicial short-cut, a doing away with the formal necessity for evidence because there is no real necessity for it. * * *"

This Court can take judicial notice of the character of the City of Torrance whether or not the Court below did so. An appellate court can properly take judicial notice of any matter of which the court of original jurisdiction may properly take notice. (*Pennington v. Gibson,* 16 How. 65, 14 L. Ed. 847.) Thus as the decision below was clearly correct, it should be sustained, if this Court believes that there is no room for factual dispute,

upon the principle of judicial notice. It is submitted that the complaint does set forth, however, sufficient facts to demonstrate that a finding on trial that appellants' efforts were necessary to the production of steel would be erroneous.

III.

The Plant Cafeteria in Question Is a Retail or Service Establishment and Thus Appellants Cannot Be Engaged in the Production of Goods for Commerce.

Section 13(a)(2) of the Act definitely provides something more than an exemption. Observe that under the express words of Section 13(a)(2) with respect to any employee engaged as therein stated, none of the provisions of Section 7 (that is, neither the "engaged * * * in the production of goods for commerce" nor the "engaged in commerce" or any of the other provisions of Section 7) have any application. It follows that if an employee is engaged as stated in Section 13(a)(2), then he necessarily is not "engaged * * * in the production of goods for commerce" within the meaning of Section 7(a). This must be true, notwithstanding the history and origin of Section 13(a)(2) as reviewed by the United States Supreme Court or the construction placed by that Court upon Section 13(a)(2) in *Roland Electric Co. v. Walling* (1946), 326 U. S. 657,* such history and origin and such

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*The opinion in *Roland Electric Co. v. Walling* (1946), 326 U. S. 657, in discussing the origin of Section 13(a)(2), said that in the attempt to keep substandard intrastate goods from competing with interstate goods the only purpose in the exemption was to exempt retailers dealing with the ultimate consumer (pp. 669-671). It further points out that the distinction is basically between wholesale and retail and that "service" should be given a similarly restricted meaning (pp. 671-675).

construction being not in opposition to, and the decision in that case being in actual support of, appellee's argument herein to the effect that the complaint is legally insufficient to state a cause of action under Section 7(a) of the Act.

Moreover, the following excerpt from the opinion in that case, page 667:

> "* * * To the extent that sales or services are necessary for the production of goods for interstate commerce they generally are by that hypothesis not sales or services to an ultimate consumer for his personal use and, accordingly, are neither 'retail' sales nor services of a comparable character, within the meaning of sec. 13(a)(2)."

actually supports the point under immediate consideration. Defendant concludes, therefore, that if any of its employees involved herein be engaged in any retail or service establishment within the meaning of Section 13(a)(2), then such employee is not "engaged * * * in the production of goods for commerce" within the meaning of Section 7(a).

Irrespective of the argument to the effect that Section 13(a)(2) must be considered in determining whether the complaint states a valid cause of action under Section 7(a) of the Act, appellee maintains that its business was a retail or service establishment within the meaning of Section 13(a)(2). This, because such establishment conforms to what the United States Supreme Court considers the characteristics of such an establishment to be. In this connection, it appears unnecessary to consider any United States Supreme Court decision other than *Roland Electric Co. v. Walling* (1946), 326 U. S. 657, since that de-

cision was rendered subsequent to the decision in the *Womack* case. It is believed that there is no other decision of the United States Supreme Court which contributes anything by way of explaining what are retail or service establishments within the meaning of Section 13(a)(2) which was not considered in *Roland Electric Co. v. Walling.*

Roland Electric Co. v. Walling involved employees of an independent company who were engaged in servicing electrical motors in the plants of manufacturing concerns engaged in producing goods for commerce. The court, after determining that the employees therein were engaged in producing goods for commerce, proceeded to consider whether they were exempt from the Act under Section 13(a)(2) and concluded that they were not. That result was reached on the ground that a retail or service establishment of the kind referred to in Section 13(a)(2) is one which sells to or serves ultimate individual, as distinguished from industrial or commercial, consumers. Appellee contends that its cafeteria was a retail or service establishment within the meaning of Section 13(a)(2) because it was the kind which accorded with the characteristics of such an establishment as determined by the court in *Roland Electric Co. v. Walling.* Following are applicable excerpts from the opinion in that case (pp. 666-667):

"* * * * * * * * *

"If read in a detached and broad sense, it can be made to exempt from the Act the employees of the petitioner together with hundreds of thousands of other employees like them, to the serious detriment of the effectiveness of the Act, however, if read in connection with the declared purpose of the Act and in the

light of its legislative history and administrative interpretation, the clause does not reach employees 'engaged in the production of goods for commerce' as were those in this case. When so read, the exemption reaches employees of only such retail or service establishments as are comparable to the local marchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach. See §2, *infra.* Without this clause such local establishments might find themselves technically covered by the Act, not because they were producing goods for (interstate) commerce, but because, for example, they were retailing milk near a state line and, therefore, might be regarded as actually in interstate commerce when delivering retail sales of milk to local customers, all of whom were ultimate consumers of it for their personal use, but a small proportion of whom lived across the state line from the milk dealer.

* * * * * * * *

"Similarly, it was felt that without this exemption clause, the employee of a local merchant who purchased his goods from outside his State but retailed them all within his State to ultimate consumers across his counter, might, nevertheless, technically be covered by the Act as being actually 'in (interstate) commerce' because of his purchases, although his sales all might be at 'retail' and beyond the end of the 'flow of goods in commerce.'

* * * * * * * *

It is rare, if not impossible, for an employee who is engaged in an occupation necessary to the production of goods for interstate commerce to be said to be at the same time an employee engaged in a retail

or service establishment whose selling and servicing is confined to ultimate consumers. These employments are largely mutually exclusive.

* * * * * * * * *"

Thus, it is to be seen that *Roland Electric Co. v. Walling* furnishes supreme authority for appellee's argument that its employees involved herein are engaged in a retail or service establishment of the kind referred to in Section 13 (a)(2). Appellee's cafeteria complied precisely with the characteristics of such establishment as determined by the United States Supreme Court.

Notwithstanding its location on the steel company's premises, appellee's cafeteria is "comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that 'flow of goods in commerce' which it is the purpose of the Act to reach." Appellee's cafeteria sold to and served ultimate indivdual, not commercial or industrial, consumers, who bought the same articles and for the same reasons as do "the customer of the local merchant, local grocer * * * who buys for his own personal consumption." Moreover, appellee's customers obviously bought the same things and required the same service irrespective of whether they were on the steel company's premises, at home or at play.

There was absolutely nothing that appellee produced or sold or served which "remained actively in use in the production of the 'flow of goods in commerce' " or contributed to the slightest extent to such "flow." Obviously, there are many things that transpire upon the steel company's plant premises which are beyond and wholly unrelated to the flow of goods in commerce. It is a part of human

conduct that things unrelated to the steel company's production occur on the steel company's plant premises, and merely because they occur on said premises while the employees of the steel company are at work thereon does not relate such things to the flow of goods in commerce. Stated more specifically, it is of controlling importance in the instant case that appellee's selling and servicing operations were not of service to the steel company but a service of convenience to those ultimate individual consumers who, while on the steel company's premises, might at any time or from time to time desire to make use thereof in the satisfaction of their purely personal wants which exist, aside from their productive efforts, while they are at home, at work or at play.

Respectfully submitted,

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